IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KATHY V. LUNA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17-CV-00291
	)	
GUILFORD COUNTY, NORTH CAROLINA,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

THOMAS D. SCHROEDER, Chief District Judge.

This is an employment discrimination action by Plaintiff Kathy V. Luna against Guilford County, North Carolina ("Guilford County" or "the County"), pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. ("Title VII"). (Doc. 1.) On May 11, 2018, fourteen months after the complaint was filed, the court dismissed the action with prejudice due to Luna's failure to prosecute. (Doc. 27.) The County now moves for an award of attorneys' fees against Luna and her counsel, Norman B. Smith, for alleged bad faith prosecution.[1] (Doc. 28.) The motion has been fully briefed by Smith, and by the County; Luna has not responded on her own behalf.[2] (Docs. 29, 35, 38.) For

[1] The parties' prior consultation required by this court's local rules resulted in no agreement. (Doc. 28-1; Doc. 29 at 1.)

[2] Smith states that the North Carolina State Bar has advised him "that in light of plaintiff's refusal to communicate with him about the case, he is not permitted to file any pleading on her behalf in opposition to

the reasons set forth below, the motion will be denied.

I. BACKGROUND

Luna was employed by Guilford County's Department of Health and Human Services until she was discharged on March 18, 2016. (Doc. 4 ¶¶ 3–5.) While employed, she filed three charges of discrimination against the County with the Equal Employment Opportunity Commission ("EEOC"): the first was filed on August 15, 2013, and complained of racial discrimination; the second was filed on August 7, 2015, and complained of retaliation based on the previous complaint of racial discrimination; and the third was filed on May 23, 2016, alleging retaliation. (Id. ¶¶ 6, 14.) In response to her third charge, Luna was notified of her right to file suit against Guilford County within 90 days of January 31, 2017. (Id. ¶ 15.) Luna timely commenced this lawsuit on or about March 1, 2017. (Doc. 1 ¶ 1; Doc. 4 ¶ 15; Doc. 35 at 2.) The complaint alleges 18 retaliatory actions by Luna's supervisors and managers, including her termination. (Doc. 4 ¶¶ 9, 12.)

The County attributes to Luna and Smith several impediments to proceeding during the pendency of the action. It complains about late and incomplete discovery responses by Luna, but Luna's responses to requests for admissions were timely served, and although responses to interrogatories and requests for production

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defendant's motion insofar as it seeks relief against plaintiff, as opposed to attorney Norman B. Smith." (Doc. 35 at 1.)

of documents were tardy, that dispute appears to have been worked out in substantial part in an attorneys' conference pursuant to Local Rule 37.1. See (Doc. 35 at 5; Doc. 38 at 2–3.) Luna also served discovery requests. See (Doc. 17 at 4.) At some point, Luna became unresponsive to Smith's communications, and on November 17, 2017, Smith sought to withdraw from representation. (Doc. 15.) The County opposed the motion on the grounds that Smith failed to file an accompanying brief (as required by Local Rule 7.3(a)) and the prospect of delay. (Doc. 17.) On December 20, 2017, the magistrate judge denied the motion without prejudice. The magistrate judge set the motion for hearing again on January 3, 2018, but Luna failed to appear for that hearing as well. The magistrate judge entered an order January 8, 2018, setting a deadline for supplemental discovery responses by Luna and her deposition for January 15; the court warned that Luna's failure to comply would result in consideration of a motion to dismiss her action. (Doc. 20 at 3.)

Prior to Luna's deposition and a previously-scheduled mediation, Smith suggested to the County it would be unproductive to hold either, as Luna's lack of communication made it apparent that she would not attend. (Doc. 36 ¶ 22.) The County rejected this advice, insisting on holding both on the grounds they were court-ordered. (Doc. 29 at 4; Doc. 38 at 14.) As predicted, Luna

did not attend either, and Smith has been unable to reach her. (Doc. 29 at 5; Doc. 35 at 3.)

On May 11, 2018, the court entered a memorandum opinion and order granting the County's motion to dismiss the action with prejudice for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). (Doc. 26.)

II. ANALYSIS

A. Luna's Liability for Attorneys' Fees Pursuant to Title VII

Guilford County first argues that Luna should be required to pay attorneys' fees because her abandonment of her claims and resistance to the discovery process demonstrates that her claims were frivolous, unreasonable, and groundless. (Doc. 28 at 2.) The County argues that Luna's claims were frivolous because the claims based on employment actions alleged in her 2013 and 2015 EEOC charges were time-barred, but Luna persisted in pressing those them in this lawsuit. (Doc. 28 at 2–3.) Because the complaint failed to provide dates for the alleged retaliatory actions, the County contends that it could not determine whether those actions were related to the time-barred 2013 and 2015 EEOC charges, or the timely filed 2016 EEOC charge. (Doc. 28 at 2–3; Doc. 4 ¶ 9.)

Title VII authorizes an award of attorney's fees to a prevailing party as part of its costs. 42 U.S.C. § 2000e-5(k). To award attorney's fees to a prevailing defendant, the court must

find that the plaintiff's claims were "frivolous, unreasonable, or groundless," or that "the plaintiff continued to litigate after it clearly became so." CRST Van Expedited, Inc., v. E.E.O.C., 136 S. Ct. 1642, 1646 (2016) (quoting Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422 (1978)). A claim is frivolous if there is no evidence to support the plaintiff's claim or if the plaintiff has no colorable legal theory. Davis v. Target Stores Div. of Dayton Hudson Corp., 87 F. Supp. 2d 492, 494 (D. Md. 2000) (citing Gilyard v. S.C. Dep't of Youth Servs., 667 F. Supp. 266, 276 (D.S.C. 1985)). To meet the frivolousness standard, a defendant need not demonstrate that the plaintiff brought the action in subjective bad faith. E.E.O.C. v. Great Steaks, Inc., 667 F.3d 510, 517 (4th Cir. 2012) (citing Christiansburg, 434 U.S. at 421). Because awarding attorney's fees to a prevailing defendant could "undercut Congress's efforts in promoting the vigorous enforcement of Title VII by substantially increasing the risks inherent in bringing such claims," the Fourth Circuit has "recognized that awarding attorneys' fees to a prevailing defendant is 'a conservative tool, to be used sparingly.'" Id. (first quoting Christiansburg, 434 U.S. at 422, then quoting Arnold v. Burger King Corp., 71 F.2d 63, 65 (4th Cir. 1983)).

Even if the allegations in Luna's complaint relating to the 2013 and 2015 EEOC charges were time-barred, the claim relating to the 2016 EEOC charge appears to have been timely. Luna's complaint

shows a colorable legal theory of retaliation based on her termination in 2016 and the other alleged incidents of discrimination. Thus, even if some of these alleged retaliatory actions related to time-barred EEOC charges, at least some of the alleged retaliatory conduct related to an apparently timely charge.

The County also argues that Luna failed to put forth any evidence that she had been discriminated against in violation of Title VII. (Doc. 29 at 8–9.) As Smith correctly points out, if this was the case, the County could simply have moved to dismiss the claims that it characterizes as baseless. (Doc. 35 at 2.) Rather than doing so, the County chose to continue with discovery. (Doc. 38 at 2.) Therefore, the court does not find that the complaint was frivolous, unreasonable, or groundless, and will not hold Luna liable for attorneys' fees pursuant to Title VII.

B. Counsel's Liability for Attorneys' Fees Pursuant to 28 U.S.C. § 1927

The County argues that Smith should be personally liable for attorneys' fees under 28 U.S.C. § 1927 because he acted in bad faith to multiply the proceedings. (Doc. 28 at 3–4.) Smith disputes this. (Doc. 35 at 8–10.)

Section § 1927 provides: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the

excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "The unambiguous text of § 1927 aims only at attorneys who *multiply* proceedings." DeBauche v. Trani, 191 F.3d 499, 511 (4th Cir. 1999). Since § 1927 "'is concerned only with limiting the abuse of court processes[]' . . . . an attorney who files a meritless claim may not be sanctioned under § 1927 if he does not [unreasonably and vexatiously multiply the proceedings]." Id. (quoting Roadway Express Inc. v. Piper, 447 U.S. 752, 762 (1980)). In addition, "[b]ad faith on the part of the attorney is a precondition to imposing fees under § 1927." Great Steaks, Inc., 667 F.3d at 522 (citing Chaudry v. Gallerizzo, 174 F.3d 394, 411 n.14 (4th Cir. 1999), and Brubaker v. City of Richmond, 943 F.2d 1363, 1382 n.25 (4th Cir. 1991)). "Objective bad faith does not require malice or ill will; 'reckless indifference to the law will qualify. If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious.'" Stradtman v. Republic Servs., Inc., 121 F. Supp. 3d 578, 582 (E.D. Va. 2015) (quoting Collins v. Dollar Tree Stores, Inc., No. 2:09cv486, 2010 WL 9499078, at *3 (E.D. Va. May 28, 2010)). [3]

[3] The Fourth Circuit has not definitively stated whether § 1927's bad faith requirement is the "more stringent" subjective standard or less stringent objective standard. Stradtman, 121 F. Supp. 3d at 581–82 ("The Fourth Circuit has not issued any definitive pronouncement regarding the appropriate standard in a post-Salvin [v. Am. Nat'l Ins. Co., 281 F.

The County's argument that a reasonable investigation would have revealed to Smith that some of Luna's claims were time-barred, even if true, does not mean that Smith acted in bad faith for purposes of § 1927, which "focuses on the conduct of the litigation and not its merits." Great Steaks, Inc., 667 F.3d at 522–23 (quoting DeBauche, 191 F.3d at 511) (rejecting defendant's argument that plaintiff acted in bad faith to vexatiously and unreasonably multiply the proceedings when plaintiff litigated the case even though it lacked a foundation and "a reasonable investigation would have revealed the weaknesses in the [plaintiff's] case and prompted the [plaintiff] to dismiss it"). Even if some investigation may have revealed to Smith that some of the factual allegations would have been time-barred, the complaint had a factual and legal theory grounded in the retaliation claim based on Luna's March 2016 termination and May 2016 EEOC charge. Moreover, while Smith missed some discovery deadlines and failed to follow some local rules, these did not multiply the proceedings unreasonably or vexatiously.[4] Further, he did attempt to avoid

App'x 222 (4th Cir. 2008)] case.") In light of the extensive case law indicating that § 1927 requires only an objective showing of bad faith, and because the facts here indicate that Smith did not act in bad faith even under the less stringent objective standard, the court will apply the objective standard. Id.; Collins, 2010 WL 9499078, at *3–4.

[4] Smith argues that because no effort was made to amend the complaint or file substitute pleadings, he cannot be said to have multiplied the proceedings. (Doc. 35 at 8.) In support he cites Debauche, where the Fourth Circuit concluded "as a matter of law that the filing of a single complaint cannot be held to have multiplied the proceedings unreasonably

the costs related to the deposition and mediation by advising the County that he had not heard from his client in some time and that she was therefore not going to attend. While the County's decision to go forward with both was understandable, it was not because of anything Smith did to multiply the proceedings. Finally, it cannot be said that Smith unreasonably multiplied the proceedings for attempting to withdraw, including his failure to attach a brief, which resulted in two hearings before the magistrate judge. See Arnett v. Pizza, No. 01-2149 D/An, 2008 WL 11409435, at*2 (W.D. Tenn. Apr. 21, 2008) (finding that plaintiff's counsel's filing of

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and vexatiously and therefore that § 1927 cannot be employed to impose sanctions." DeBauche, 191 F.3d at 511–12. Guilford County contends that "courts have refused to extend DeBauche in the manner which Mr. Smith proposes," citing O'Connor v. Columbia Gas Transmission Corp., No. 3:09-CV-00022, 2009 WL 3055365, (W.D. Va. 2009) and Salvin v. Am. Nat'l Ins. Co., 281 F. App'x 222, 226 (4th Cir. 2008). (Doc. 38 at 7–8.) As the County correctly points out, at least two unpublished Fourth Circuit cases and some district court cases have distinguished factual situations from DeBauche and indicated that it is possible for an attorney to be subject to § 1927 sanctions when he or she has filed only a single complaint if subsequent conduct multiplied the proceedings unreasonably and vexatiously. Salvin, 281 F. App'x at 225–26 (distinguishing attorney's failure to withdraw a meritless claim from the filing of the single faulty complaint in DeBauche); Sweetland v. Bank of Am. Corp., 241 F. App'x 92, 97 (4th Cir. 2007) (holding that even though only one complaint was filed, the attorney's filing of a "baseless" motion for summary judgment constituted an unreasonable and vexatious multiplication of the proceedings where the attorney "took affirmative steps to stall the discovery process through evasive and nonresponsive answers"); O'Connor, 2009 WL 3055365, at *3 (distinguishing attorney's filing of a motion to alter or amend from the filing of an amended complaint by the attorney in DeBauche). While relevant, these unpublished opinions "are entitled only to the weight they generate by the persuasiveness of their reasoning." Hupman v. Cook, 640 F.2d 497, 501 (4th Cir. 1981). For the reasons noted above, the court finds that Smith's behavior does not rise to the level of vexatiousness and unreasonableness found in these unpublished cases.

multiple motions to withdraw, prior to the judge denying one of the motions with prejudice, did not constitute sanctionable conduct that unreasonably and vexatiously multiplied the proceedings under § 1927); cf. Record Data, Inc. v. Schoolcraft, No. 83 C 9537, 1989 WL 2071, at *5 (N.D. Ill., Jan. 10, 1989) (including attorneys' refusal to withdraw as part of a pattern of discovery abuses meriting sanctions under § 1927).

Therefore, the court will not hold Smith liable for attorneys' fees pursuant to § 1927.

C. Liability for Attorneys' Fees Pursuant to the Court's Inherent Authority

In the alternative, the County argues that both Luna and Smith should be liable for attorneys' fees pursuant to the court's inherent authority, on the grounds that both acted in bad faith by bringing claims that they knew or should have known were time-barred, causing excessive discovery delays, and refusing to participate meaningfully in the litigation. (Doc. 28 at 4–5.)

A court has inherent authority to award attorney's fees when a party has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons," though this power "must be exercised with restraint and discretion."[5] Chambers v. NASCO, Inc., 501 U.S. 32,

[5] As with an inquiry of bad faith under § 1927, it is unclear whether a subjective or objective standard applies to the bad faith determination invoking the court's inherent power. Stradtman, 121 F. Supp. 3d at 587–88 (citing Blair v. Shenandoah Women's Ctr., Inc., 757 F.2d 1435, 1438 (4th Cir. 1985)). Here, too, the court will apply the objective standard.

44–46 (1991) (citations omitted); Brubaker, 943 F.2d at 1382 n.25. A court may award fees pursuant to its inherent power for the willful disobedience of a court order, or where a party acts in bad faith to delay or disrupt the proceedings. Chambers, 501 U.S. at 45–46. As the court does not find that either Luna or Smith acted in bad faith, it declines to award attorneys' fees pursuant to its inherent authority.

III. CONCLUSION

For the reasons stated,

IT IS ORDERED that Guilford County's motion for attorneys' fees (Doc. 28) is DENIED.

/s/ Thomas D. Schroeder
United States District Judge

January 24, 2019